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Draft LEA comments to AB1497 Permit Implementation Regulations 15-day review period.

The County of San Diego Solid Waste Local Enforcement Agency (LEA) has reviewed the draft proposed Permit Implementation Regulations (AB 1497) provided during the 15-day review period and is providing the following comments for your consideration.

Comments:

Authority for proposed regulatory changes

We noted in our June 2, 2006 comment letter that AB 1497 does not require or authorize the California Integrated Waste Management Board (CIWMB) to impose a requirement for a public meeting before a new facility solid waste permit is issued; nor does it authorize or require the CIWMB to impose any new noticing requirements. Staff acknowledged that these points were correct in subsequent discussions, but stated that the proposed regulations implemented a Board directive. The requirement for an LEA public meeting for new facility permits is retained in these revisions, but is limited to "full" solid waste permits. Requirements to provide additional notices are actually expanded in this revision.

The CIWMB Board should not impose meeting or notice requirements on LEAs except as provided by statute--this is an issue that state law has expressly, and rationally, addressed in a different manner for revisions to permits versus new facility permits. **The LEA strongly requests Proposal 2006-34 be revised to eliminate the new, non-statutory, requirement for a public informational meeting for new facility permits and the new, non-statutory noticing requirements for RFI amendments and modified permits.**

Informational meetings for new facility permits

The CIWMB has authority to promulgate regulations to implement the Public Resources Code (PRC). Moreover, AB 1497 only directed the CIWMB to define the phrase "significant change in the design or operation of the solid waste facility that is not authorized by the existing permit" as

used in PRC 44004(a). The PRC contains no requirement for a public hearing prior to EA approval of an application for a new solid waste facility permit. The statutory requirement for a hearing applies only to significant changes at already-permitted facilities. Similarly, AB 1497 does not direct that this public hearing requirement be extended to new facilities.

There is clearly a rational basis for the different treatment of new and revised permits that the legislature has directed. A change in design or operation at an existing facility may not require a new CEQA document, because it may not involve new impacts or significant increases in impacts that were not previously analyzed. There may also be no requirement for a new land use permit, because many older landfill use permits are written so broadly. For these changes, the EA and local authorities may therefore never be subject to a public notification requirement, and may never be exposed to local community comments, unless a notice requirement or a hearing requirement is imposed. This makes a mandated local informational meeting important. In contrast, for a new facility, there will be a CEQA document and related public notice requirements, and there will typically also be a local land use approval process that includes notice and comment procedures.

This draft proposes to mandate more hearings/meetings than the law requires, by expanding the scope of these proposed regulations. A desire for consistency with CIWMB regulations for C&D facilities is not an adequate justification to set aside the categorical distinction made in the statute, especially where imposing a non-mandatory requirement would be inconsistent with a rational distinction the legislature made when these PRC provisions were enacted. The CIWMB should take into account that the legislature effectively confirmed this distinction in AB 1497, which revisited this issue area but did not impose a hearing requirement for new facility permits.

CIWMB staff's expectation that most of these hearings can be piggybacked onto land use or CEQA hearings is unlikely to be met in practice. To qualify for piggybacking, a prior hearing must meet time constraints, and must include participation by an LEA representative who must be available to answer questions at the hearing. The agencies that conduct potential piggy-back hearings will in most cases not be taking comments at those hearings, not responding to questions, and may not welcome the complications that LEA participation on these terms would involve. In addition, it is important that CEQA hearings and land use hearing not prejudge whether a facility permit will be issued. Requiring an LEA representative to answer questions at these earlier hearings, likely before a complete solid waste facility permit has been submitted, will create an impression that the LEA already intents to forward a proposed permit or permit change to the CIWMB.

AB 1497 did not authorize or direct the CIWMB to develop regulations to require public information hearings for new facility permits. Proposal 2006-34 should therefore be revised to eliminate the new, non-statutory, requirement for an LEA public informational meeting for new facility permits.

Requiring EA notice for "modified" permits and RFI amendments

In the revised text noticing requirements for RFI amendments have been moved to the post-decision period, and have been clarified as to content. Similarly, the revised text clarifies that pre-permitting notice requirements are triggered by acceptance of an application as complete and correct, not by the mere receipt of an application. Those changes are appreciated.

The proposed regulations impose new notice requirements even where a proposed change at a facility can be processed as an RFI amendment or as a permit modification based on an EA

determination that the proposed change is not a "significant" change for purposes of PRC 44004(a). (21660.1, 21660.3) Once that determination is made, however, there is no basis in the PRC or in AB 1497 for imposing a notice requirement on EAs. The requirement for this notice by the EA should be dropped.

Notice requirements for modified permits continue to state that the notice must include information on "options for submitting comments." The regulations do not specify what options for submitting comments, if any, the EA must offer. We presume that lack of specificity is intentional, and that any reasonable mechanism for accepting comments will comply with this requirement. For example, where subsequent CIWMB review of an EA action is mandated, the notice could state that there will be an opportunity to comment during CIWMB review. The absence of specificity in these regulations as to this requirement is appropriate, because there is no statutory basis to require an EA to accept public comments for any permit change other than a significant change, or to respond to comments for any permit change.

Finally, the new language in proposed section 21660.3(b)(2)(a) and (b), referring to posting "in compliance with Government Code section 65091" must be revised for legal accuracy, e.g. to read "in the manner set forth in Government Code section 65091." This change is necessary because section 65091 imposes a requirement for posting only where a public hearing is required by Title 7 (Planning and Land Use) of Division 1 of the Government Code. The Government Code does not impose the hearing requirement the CIWMB is manufacturing.

Delegation of CIWMB authority for approval of "modified" permits

The proposed regulations continue to provide that the CIWMB Executive Officer (EO), rather than the Board, will concur or object to a "modified permit" as classified by the EA. PRC 44009 specifically states that "the board shall, in writing, concur or object to the issuance, modification, or revision" of any solid waste facilities permit. We noted in our previous comments that moving this concurrence function to the EO would eliminate a pre-decision, noticed public hearing before the CIWMB, which seems contrary to the CIWMB general intent to increase opportunities for public participation in the permitting process.

In the revised text, staff have added language requiring the EO to report his actions to the Board at a regularly scheduled meeting, and to post information to the web site or agenda. That formulation means a member of the public who reviews Board agendas may not receive notice of these actions, even after the fact, because the only posted notice may be on the web. This may not be a Brown Act violation, because the EO's report would be for information and not for action, but it is inappropriate for the CIWMB to impose new notice and meeting obligations on EAs where there is no statutory basis for doing so, while at the same time using its delegation powers to eliminate public notice and public comment on the same decisions at the CIWMB level.

In our prior comments we urged that this reduction in the transparency and accessibility of permitting processes at the CIWMB should be reconsidered, or it should be disclosed and explained forthrightly in the rulemaking package. The revised text retains this delegation. It is unclear whether a clear disclosure and forthright explanation will be made available to the public; the staff report on this latest set or revisions was not available on the web as of noon on September 25, 2006.

Proposed definition of "significant change"

In our prior comments, we objected to the proposed definition of "significant change" because of concern that a regulatory test tied to mitigation decisions could result in unintended feedback between CEQA determination, and the substantive decisions made by applicants and EAs. We urged that this connection be recognized, and better managed. The revised text addresses this concern with a patch, by adding the following language in proposed section 21563(d)(6): *"The definition is for purpose of determining when a permit needs to be revised and should not be utilized for making determinations relative to the California Environmental Quality Act (CEQA), Title 14 CCR 15000 et seq."*

For section 21563(d)(6) this clarifying denial is both contrary to fact, and circular. It is contrary to fact because any test of significance for permit classification purposes, that is tied to an EA determination that mitigation is necessary, must have implications for CEQA. This clarification is also circular, because a small "r" decision to revise the permit makes the change a permit Revision instead of a permit Modification.

These tensions cannot be wished away, but they could be better managed. The necessary change would be to give EAs discretion to write permits as they should be written, without confusing the inclusion of a condition in a permit, with the significance of the actual change at the regulated facility. Breaking the deterministic linkage in the proposed text would allow an EA to impose "restrictions, prohibitions, mitigations, terms, conditions or other measures to adequately protect human health, public safety, ensure compliance with State Minimum Standards or to protect the environment" in connection with changes that have no actual significant impact, without automatically reclassifying what is small as something big. EAs may include restrictions, etc. in permits for any number of reasons. A condition may be essentially a standard recitation to inform the applicant of an existing legal requirement (e.g., comply with state minimum standards). A restriction or condition may be included in a permit in response to a comment, even if the scenario or concern raised in the comment is not really a significant matter, or even if the restriction or condition is never expected to become a binding constraint based on actual operations.

A further concern here is that some permit changes may have significant impacts that can and should be mitigated but not by the EA. Mitigation may instead be imposed by an RWQCB or a resource agency in connection with another required permit. Under the proposed definition, these changes would not be identified as significant because the EA would not impose the necessary and feasible mitigation in the EA's permit.

A new definition of "significant change", section 21563 (d)(6), is needed. We previously suggested, and again suggest, the following:

"The EA determines that the change itself would have or could have a significant adverse effect on human health or the environment, that will not be reduced to an insignificant level through compliance with applicable requirements of the Public Resources Code or CIWMB regulations; and the EA has identified additional feasible prohibitions, mitigations, conditions or other measures for consideration as permit requirements to reduce those adverse impacts."

Unnecessary appeals and litigation

The proposal could be clearer concerning how distinctions between RFI amendments, significant changes requiring a revised permit, and lesser changes requiring only a modified permit,

will be made. A key consideration should be to make clear that these determinations are to be made by the LEA, or if proposed to the LEA by an applicant, can be accepted or rejected by the LEA

At section 21666, the proposal appears to contemplate that applicant will make the initial determination as to whether a proposed change qualifies as an RFI amendment, with the possibility an LEA may pare down the changes that will be approved on that basis. The section should further provide that the LEA may reject an application for an RFI amendment if the LEA concludes that a permit amendment is needed instead.

Section 21666 further provides that an applicant retains a right to appeal. In contrast, at 21665(b) this RFI determination, and the determination as to whether a more significant change should be classified as a "modified" or "revised" permit, are expressly reserved for the LEA, and appeal rights are not expressly addressed.

All LEA determinations concerning the classification of applications for processing purposes are interim decisions that do not finally determine the rights of an applicant, whether a permit will be granted or denied, or how a permit may be conditioned. These regulations should make it clear that these interim, procedural LEA determinations are not subject to appeal.

We previously requested the deletion of sections 21660.1 (a) (7), 21660.3 (a) (11), and 21660.4 (a) (10) to eliminate references to appeals where no appealable EA action had been taken.

Moving the notification point for RFI amendments to the post-decision period makes the reference to 21660.1(a)(7) [now (a)(6)] relevant.

The requirement that notice concerning appeals processes be provided when certain applications are determined to be complete and correct (see 21660.3(a)(11) [now (a)(10)) has been retained, and is still inappropriate because this LEA determination is not appealable. However, the revised text usefully clarifies that the information concerning appeals is to address the issuance or denial of a permit, i.e., a future LEA action. It would be better to also defer this notification requirement to a time when the information is pertinent, but the clarified language in this subsection is helpful.

The above comment concerning 21660.3(a) is also applicable, but with greater force, to 21660.4(a)(10) [now (a)(9)], because the later subsection applies to notices connected to substitute public meetings that could be held before a permit application is even received, much less accepted as complete and correct. It would be confusing to the public to be told, at that stage in a permitting process, that eventually there will be an opportunity for an appeal.

New mandatory duties for LEAs

We remain concerned that this rulemaking will impose new mandatory duties on LEAs; because every mandatory duty increases the risk the EA will be exposed to litigation seeking damages allegedly caused by an LEA's failure to perform that mandatory duty. The revised text is somewhat improved in this regard, some requirements are moved from a pre-decision to a post-decision trigger, and other requirements are simplified or clarified (e.g., the clarification that meeting requirements are triggered only if the EA determines that an application is for a "revised" permit. (21660.2.). This rulemaking is still fundamentally a CIWMB decision to impose requirements on EAs, on a mandatory basis, that are not required or authorized by statute.

Minor changes list and divesting the LEA of authority

In our prior comments we complained that this proposal effectively divests LEAs of authority over "minor" changes to permitted facilities, because these changes can be implemented "without LEA review and approval" if specified criteria are met. The proposal provides no opportunity for the LEA to satisfy itself that those criteria are in fact met before a change is implemented. Instead the applicant will make those decisions, telling the LEA later, and the burden will be on LEAs to detect and to take enforcement action to reverse changes asserted to be "minor" that are not appropriate for the facility without further LEA review.

Simplifying the permitting process for changes that truly do not need EA review is a reasonable policy objective. However, when the simplifying mechanism used is post-change reporting by the operator, and the burden to justify an objection is placed on the EA, it is crucial that the effectively exempted changes be carefully defined. We have five suggestions for further revisions to insignificant change listing provisions in the revised text, to achieve a clear understanding of these provisions.

First, there are two potentially inconsistent tests for a minor change in these regulations. Section 21620(a)(1)(A) through (D) is a set of four conditions that must all be satisfied for a change to be minor. But 21620(a)(1)(E) states absolutely that "minor changes include" a list of 23 changes. If a change on that list failed to meet a condition set out in (A) through (D), confusion (and disputes) would arise as to whether the change was "minor."

Second, minor change status is "not limited to" the changes listed in subsection (a)(1)(E). It would be far more workable and less dangerous to craft this list with care, and to make being on this list a fifth condition (in addition to conditions (A) through (D)) for minor change status.

Third, to the extent conditions (A) though (D) actually define what qualifies as a minor change, those conditions are far too generous. Essentially, they boil down to a change not being expressly or effectively prohibited at the time it is made. Many changes that an EA might classify as significant and require be mitigated, if LEA review was allowed, could instead be implemented by an operator without prior notice or approval under this "not prohibited' test.

To fix all three of these problems, the introduction to subsection (a)(1)(E) should read: "Minor changes include only the following changes, and only where those changes also meet the requirements set out in (A) through (D) above: ..."

Fourth, the minor changes list itself needs revision. Items (iii), (xix) and (xxi) should be treated as minor only if notice is provided to the LEA 10 day before the change is made. It is critical that the LEA have current information on facility contacts at all times, and important that it is known in advance that a operator (whatever his professed intentions) has acquired additional property adjacent to a facility. It is also crucial that the EA be notified in advance, not after the fact when an external permit that is identified in the LEA permit as a conditioning document is amended. Revising (xxii) to make this change would also make that provision redundant, so it should instead be deleted. As to these items, the LEA does not need to be able to disapprove changes (if the conditions in (A) though (D) are also satisfied), but it does need to know about these changes in advance.

In addition, item (xviii) should qualify as minor only if records are relocated within the disposal facility. Unless this is clarified operators will attempt to move these records to remote

locations, impeding inspections. Similarly, item (xii) concerning temporary containers should be clarified to ensure that operators cannot invoke it as authority to relocate containers.

Fifth, the LEA requests the this entire section be modified as to require the operator to submit to the LEA, for determination, a minor change 30 days prior to the implementation. Without this modification to this section the LEA is placed in the position to conduct an enforcement action after the fact to correct a change that the LEA deems is not minor. This adds an unnecessary burden on the LEA that could have been avoided all together.

A final technical concern is subparagraph (F)(iv) this section presumes that permit reviews will occur only on five year intervals. The EA has authority to require such reviews as it deems necessary.

Even with these changes, the LEA remains opposed to the inclusion of a minor change list in this rulemaking. Placing lists in regulation does not allow for flexibility in decision making. The minor changes should be discussed in an LEA Advisory for use by the LEA and operator as examples of minor changes. This would allow the LEA to use discretion in accepting such changes with noticing from the operator in a manner similar to section 21620 (a) (1) (E).

Additional Comments

1. In section 21620(a)(1)(E)(x) & (xi) (as amended) are the same statement, thus duplicative.

2. In section 21620(a)(1)(E)(xii) there needs to be a statement added "without a change in location" to clarify when a change in containers used for temporary storage of materials separated for recycling is only a minor change. Also the term temporary storage needs to be defined.

3. In section 21660 item (a)(2) has been added. This requirement to send within 5 days of receipt a written notice of receipt of an application for new, revised and modified permit to every person who has submitted a written request for such notice is inappropriate. This timeline prohibits the LEA from even reviewing the application prior to noticing interested parties. This adds another burden to the LEA to notice these interested parties upon receipt of the application, again when the application is deemed complete and correct, and then again when a public hearing or meeting is to be held. The LEA strongly requests that Item (a)(2) be deleted from this section.

4. In section 21660.2(c)(1) the meeting location has been changed from not more than five (5) miles to not more than one (1) mile, although there is a provision that allows the LEA to have a meeting at a alternative location (presumable greater than one mile) this change is too restrictive and unnecessary. In most settings related to a landfill there will not be a suitable location within one mile, this then places the LEA in a position to justify to the CIWMB it's actions to have this meeting more than one mile from the facility. This is an added and unnecessary burden on the LEA that is unjustified. Any statement related to this restriction of one (1) mile should be removed from this section.

   The LEA suggests the following alternative statement:

   "The meeting shall be held in a suitable location as close as reasonably practical to the facility that is the subject of the meeting".

Thank you for the opportunity to comment on these proposed regulations. If you have any questions or require clarification, please contact me at (858) 694-3595.

Regards,

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